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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MARK D. EAGLETON,
HYMAN G. STEIN,
ROBERTS P. ELAM,
Counsel for Petitioner.

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Applicable Law Enacted by Congress Pending Determination of this Application for Writ of Certiorari.

Subsequent to petitioner's filing his application herein for writ of certiorari, a law applicable to one or more of the vital questions presented has been enacted by an Act of Congress.

By an act approved August 11, 1939,* amendatory of Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], the Congress added:

> "* * * equity receiverships of railroad corporations now or hereafter pending in any court of the United States,"

as a further type of proceeding in which

> "* * * claims for personal injuries to employees of a railroad corporation * * * shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The Circuit Court of Appeals for the Eighth Circuit held, in the proceeding here sought to be reviewed, that petitioner's claim, although a claim against a railroad corporation in equity receivership in a federal court for personal injuries to an employee of such railroad corporation, was but a general unsecured claim, and entitled to no lien or priority (R. 119-121) (103 F. [2d], l. c. 1000), and further ruled that Section 77 (n) of the Bankruptcy Act, as it then existed, giving priority to railway employees' personal injury claims "* * * applies expressly to proceedings in bankruptcy, and * * * this is an equity receivership," so that petitioner's claim was not entitled to the priority given by said section 77 (n).

The situation now presented is that, pending the determination by the Honorable Court of petitioner's petition for writ of certiorari, a law applicable to vital questions involved has been enacted, and the case should now be decided according to the law as it now exists.

The following rule was announced by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch. 103, 109:

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*The act approved August 11, 1939, is set out in full in the appendix hereto, together with Section 77 (n) of the Bankruptcy Act as amended thereby.

> "It is in general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

The first part of the above pronouncement of Chief Justice Marshall was later quoted with approval by this Court in *Dinsmore v. Southern Express Company et al.*, 183 U. S. 115, 120.

Likewise, in *Texas Company v. Brown*, 258 U. S. 466, 474, this Court, in discussing the effect of a law enacted after a judgment rendered below, and pending hearing on appeal, said:

> "Although passed after the decree below, this act must be given effect in deciding the appeal, * * *."

In *Home Savings & Loan Association v. Plass* (C. C. A. 9), 57 F. (2d) 117, the Court quoted with approval from Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 285, the following:

> "If there has been a change or alteration or repeal of the law applicable to the rights of the parties, after the rendition of judgment, and pending an appeal, the case must be heard and decided in the appellate court, according to the existing law."

It is petitioner's contention that the holding of the District Court and the Circuit Court of Appeals, as to the classification of petitioner's claim, was incorrect, and that the Act of Congress, approved August 11, 1939, is but declaratory of the equitable principles which were there-

tofore applicable to claims such as that of petitioner. However, even if the petitioner's contention be incorrect, and even if the District Court and the Circuit Court of Appeals were correct in deciding, under the law as it then existed, that petitioner's claim was but a general unsecured claim, entitled to no lien or priority, such determination and holding of those courts is incorrect under the now existing law enacted during the pendency of petitioner's petition for writ of certiorari herein, and the instant case should, we respectfully submit, be determined by this recent enactment which gives such claims a preferred status so as to be payable out of the assets of a railroad corporation in equity receivership as operating expenses of such railroad.

It is obvious that, in so changing and amending Section 77 (n) of the Bankruptcy Act, the Congress has undertaken to grant relief unto petitioner, and others similarly situated, from any inequitable classification of his and their claims, and any inequitable distinction between claims of an identical character in different types of proceedings involving the reorganization of a railroad.

To the end that such relief as the Congress intended may, by an appropriate ruling and judgment of this Honorable Court, be made promptly available unto petitioner, and others similarly situated, as well as for the reasons stated in his petition and brief heretofore filed herein, petitioner respectfully represents that his petition for writ of certiorari herein should be granted.

Respectfully submitted,

MARK D. EAGLETON,
HYMAN G. STEIN,
ROBERTS P. ELAM,
Counsel for Petitioner.

APPENDIX.

The Act of Congress approved August 11, 1939, is in words and figures as follows:

"[Public—No. 386—76th Congress]

[Chapter 689—1st Session]

[S. 2654]

An Act

To amend subsection (n), section 77, of the Bankruptcy Act, as amended, concerning payment of preferred claims.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 77, subsection (n), of the Bankruptcy Act, as amended, be further amended to read as follows:

"'In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustees appointed pursuant to this section, shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad.'

"Approved, August 11, 1939."

Section 77 (n) of the Bankruptcy Act [11 U. S. C. A., Sec. 205 (n)], as amended by the foregoing act approved August 11, 1939, is as follows (italicized portion added by the act approved August 11, 1939):

> "In proceedings under this section, *and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States*, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, arising under State or Federal laws, and claims now or hereafter payable by sureties upon supersedeas, appeal, attachment, or garnishment bonds, executed by sureties without security, for and in any action brought against such railroad corporation or trustee appointed pursuant to this section, shall be preferred against and paid out of the assets of such railroad corporation as operating expenses of such railroad. No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. No reorganization effected under this Act and no order of the Court or Commission in connection therewith shall relieve any carrier from the obligation of any final judgment of any Federal or State court rendered prior to January 1, 1929, against such carrier or against one of its predecessors in title, requiring the maintenance of offices, shops, and roundhouses at any place, where such judgment was rendered on account of the making of a valid contract or contracts by such carrier or one of its predecessors in title."